

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 05-cv-329-TCK-SAJ
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**PLAINTIFF STATE OF OKLAHOMA'S REPLY IN FURTHER SUPPORT OF
ITS MOTION TO SEVER AND STAY AND / OR STRIKE OR DISMISS
THE CLAIMS ASSERTED IN THE THIRD-PARTY COMPLAINTS**

COMES NOW Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA ("the State"), and, pursuant to LCvR7.1(h), submits this reply brief in further support of its Motion to sever and stay and / or strike or dismiss the claims asserted in the third-party complaints.

I. Introduction

The responses of Defendants Tyson¹ and Cargill misapprehend the legal principles underpinning a right to contribution.² Once these principles are correctly understood and applied, it becomes clear the claims asserted in the third-party complaints should be stricken or dismissed. Further, even assuming arguendo that any of the third-party claims were legally

¹ As in State's Motion, the term "Tyson" here refers to the multiple Poultry Integrator Defendants that filed the "Tyson Third-Party Complaint": Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., Peterson Farms, Inc., Simmons Foods, Inc., George's, Inc., George's Farms, Inc., and Willow Brook Foods, Inc.

² Defendants Tyson and Cargill dedicate a substantial portion of their responses discussing the case they think the State should have brought rather than the case the State actually brought. The fact remains, however, that the State is the master of its complaint, and its case is against the Poultry Integrator Defendants for pollution of the IRW.

viable -- which the State does not concede -- the appropriate course would be to sever and stay these claims until the conclusion of the State's lawsuit. This is particularly true inasmuch as the relief sought by Defendants Tyson and Cargill is contingent in nature and Defendants Tyson and Cargill deny that they bear any responsibility at all for the injury suffered by the State.³ To do otherwise would add great complexity to the case and cause the State to suffer severe prejudice.

II. Argument

A. The efforts of Defendants Tyson and Cargill to recast their third-party claims as something other than contribution claims fail

Apparently recognizing the fact that their contribution claims are barred as a matter of law,⁴ Defendants Tyson and Cargill try to recharacterize and recast the relief they seek in their third-party complaints as injunctive relief or other equitable relief.⁵ Nothing changes the fact, however, that these third-party claims are at their core contribution claims.⁶ Claims that the third-party defendants should "participate" in any environmental clean-up or remediation that Poultry Integrator Defendants might be ordered to undertake are simply dressed-up contribution claims, since such relief -- to the extent such third-party relief were even legally viable -- is necessarily limited by jurisprudential standing and injury-in-fact principles.

³ Not only does it deny any responsibility, Defendant Cargill goes a step further and misstates the allegations the State makes against it. In its Response, Defendant Cargill states -- needless to say, without any citation -- that "[e]ven plaintiff . . . does not allege that defendants are responsible for more than a small fraction of the present 'contributors' of such constituents to the IRW." Cargill Response, p. 6. The statement is simply incorrect, as a review of the First Amended Complaint ("FAC") plainly reveals.

⁴ Nowhere in their respective responses do Defendants Tyson and Cargill answer the State's contention that their third-party indemnity claims are not legally viable. Indeed, they appear to have completely abandoned these third-party indemnity claims. Accordingly, the lack of legal merit of these claims should be deemed confessed by Defendants Tyson and Cargill and all such indemnity claims should be stricken or dismissed.

⁵ For example, Defendant Cargill states that "[i]n addition to contribution and indemnity, Cargill's third-party complaint seeks injunctive relief, declaratory judgment, and other equitable relief against the third-party defendant state bodies." Cargill Response, p. 11.

⁶ Without citing any authority, Defendant Cargill attempts to argue that its third-party contribution claims against the municipalities somehow differ from Defendant Tyson's third-party contribution claims. However, there is no legal difference between the contribution claims.

Indeed, that the third-party claims being pressed by Defendants Tyson and Cargill are in reality all contribution claims is borne out by the express language of the third-party complaints themselves. For example, Defendant Cargill states that "[s]hould the Plaintiffs prevail on their claims and theories . . . the following Third Party Defendants should be liable in the same manner to the extent of their several share of liability under the theory of contribution, or in the alternative indemnity." Cargill Complaint, ¶ 2 (emphasis added). Defendant Cargill also states that "if the conduct of Third Party Plaintiff gives rise to liability to the Plaintiffs under their claims set forth in the Complaint (which is denied), then the City of [Tahlequah's / Westville's] conduct and operations . . . gives rise to its liability to Third Party Plaintiff under the theories of contribution and / or indemnity." Cargill Complaint, ¶¶ 6-7 (emphasis added). Defendant Tyson's third-party complaint speaks in nearly identical terms. *See* Tyson Complaint, ¶¶ 2 & 19-170.

Defendants Tyson's and Cargill's efforts to recast their third-party claims should not be countenanced. They are contribution claims, and their legal viability (or more appropriately, lack thereof), as well as their prejudicial impact on the State's case and the efficient management of this litigation, should be evaluated with this understanding in mind.

B. The third-party contribution claims of Defendants Tyson and Cargill should be dismissed or stricken

Defendants Tyson and Cargill have failed to rebut the State's contention that there is no legal right of contribution (or indemnity) in favor of a Poultry Integrator Defendant found liable under the State's claims.⁷ Accordingly, dismissing or striking the third-party complaints is an

⁷ Defendant Cargill actually asserts that "[t]he Court need not decide at this time complex legal issues addressing the merits of the parties' claims." Cargill Response, p. 10. The State strongly disagrees, since the function of a motion to dismiss or strike is to test the legal viability of the claims at the outset of the litigation. The legal issues should thus be decided now. To the extent Defendant Cargill has chosen not to respond to the State's legal arguments, the merits of the State's motion should be deemed confessed.

appropriate remedy. *See Hefley v. Textron, Inc.*, 713 F.2d 1487, 1498 (10th Cir. 1983).

1. Third-party claims for contribution under the State's common law claims are not legally viable

Defendants Tyson's and Cargill's arguments that their third-party claims for contribution under the State's common law claims are legally viable all fail. First, ignoring the fact that the State's nuisance and trespass claims sound in intentional tort,⁸ *see* FAC, ¶¶ 48-57, 99, 102, 110-13 & 121, and thus that third-party contribution claims are barred as a matter of law, *see* 12 Okla. Stat. § 832(C) & Restatement (Second) of Torts, § 886A(3), Defendant Tyson stakes out a counter-factual position, asserting that to the extent that the State's nuisance and trespass claims do not sound in intentional tort, third-party claims of contribution are not precluded. *See* Tyson Response, pp. 6-10. Defendant Tyson's position, however, is inconsistent with the State's FAC and the State's Motion.⁹

Second, *Conoco, Inc. v. ONEOK, Inc.*, 91 F.3d 1405 (10th Cir. 1996), cited by Defendant Tyson in its Response in connection with its nuisance *per se* argument, is simply not relevant to the issue at hand -- namely, whether a third-party contribution claim is legally viable where the tortious conduct is alleged to be intentional in nature.¹⁰ The fact of the matter is that there were no allegations of intentional tortious conduct in *Conoco*.

⁸ The threshold for a finding of intentionality is quite low. As noted in *City of Tulsa v. Tyson Foods, Inc.*, 258 F.Supp.2d 1263, 1301 (N.D. Okla. 2003), *vacated in connection with settlement*, "Restatement (Second) of Torts § 825 defines 'Intentional Invasion' as follows: 'An invasion of another's interest in the use and enjoyment of land or an interference with the public right, is intentional if the actor (a) acts for the purpose of causing it, or (b) knows that it is resulting or is substantially certain to result from his conduct.' . . . Whether or not the first 'invasion' is intentional, 'when the conduct is continued after the actor knows that the invasion is resulting from it, further invasions are intentional.'"

⁹ Defendant Tyson's counter-factual position springs from a misunderstanding of the meaning of the word "inasmuch," which it appears to believe means "to the extent that." It does not. "Inasmuch" means "since" or "in view of the fact that."

¹⁰ The State's nuisance *per se* claims are part of its nuisance count, which plainly does sound in intentional tort.

Third, Defendant Cargill asserts that the State's position on the availability of contribution under its common law claims is "internally contradictory" inasmuch as the State "acknowledges that, where parties are jointly and severally liable, contribution is available." *Citing to* 12 Okla. Stat. § 832(A). The reality is that there is no internal contradiction in the State's position. A forthright characterization of the State's position would have acknowledged the accompanying principle -- cited by the State in its Motion, p. 13 -- that "there is no right of contribution in favor of any tort-feasor who has intentionally caused or contributed to the injury or wrongful death." 12 Okla. Stat. § 832(C) (emphasis added); *see also* State's Motion, p. 15, *citing* Restatement (Second) of Torts, § 886A(3) ("There is no right of contribution in favor of any tortfeasor who has intentionally caused the harm"). The State has clearly alleged in its FAC that the Poultry Integrator Defendants' conduct has been intentional. Accordingly, as a matter of law, the third-party contribution claims under the State's common law claims fail, and should be stricken or dismissed.

2. Third-party claims for contribution under the State's unjust enrichment claim are not legally viable

As to its third-party claims for unjust enrichment, Defendant Cargill fails to even respond to the State's contention that there is no right of contribution or indemnity. Defendant Tyson, meanwhile, admits that its third-party claim for unjust enrichment as pled is not viable. *See* Tyson Response, pp. 10-11. Accordingly, the third-party claims for unjust enrichment should be dismissed or stricken.

3. Third-party claims for contribution under the State's RCRA claim are not legally viable

As explained above, despite efforts to recast them as something else, *see* Tyson Response, pp. 11-13 & Cargill Response, pp. 11-12, Defendants Tyson's and Cargill's third-party

claims under RCRA are at their core contribution claims. Further, as explained in the State's Motion, claims for contribution are not available under RCRA. *See* State's Motion, pp. 20-21. Defendant Tyson attempts to circumvent this bar by arguing that *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996), precluded only third-party claims for recovery of past RCRA clean-up costs and left open the issue of whether third-party claims for on-going or future RCRA clean-up costs were viable. In the years following *Meghrig*, however, a number of courts have spoken on this very issue and the answer is clear: third-party claims for on-going or future costs are not legally viable. *See, e.g., United States v. Domestic Industries, Inc.*, 32 F.Supp.2d 855, 870-71 (E.D. Va. 1999) (under RCRA a private party cannot recover through contribution or indemnity civil penalties or clean-up costs for land that has not yet been cleaned); *Andritz Sprout-Bauer, Inc. v. Beazer East, Inc.*, 174 F.R.D. 609, 617 (M.D. Pa. 1997) (under RCRA a private party cannot recover costs they will incur for clean-up efforts conducted after invocation of statutory process and initiation of legal action); *Davenport v. Neely*, 7 F.Supp.2d 1219, 1226-30 (M.D. Ala. 1998) (RCRA does not allow third-party claims for contribution for future clean-up costs). The third-party relief sought by Defendants Tyson and Cargill with respect to RCRA is thus legally unavailable. As such, this third-party claim should be dismissed or stricken.

4. The legal viability of the third-party claims for contribution under the State's CERCLA claim is open to question

Defendants Tyson and Cargill both operate under the mistaken assumption that the State's CERCLA section 107(a) cost recovery and natural resource damages claims are in reality section 113(f) contribution claims. *See* Cargill Response, pp. 12-13; Tyson Response, p. 6. This assumption is legally wrong. Defendants Tyson and Cargill fail to understand that even assuming arguendo that the State were a potentially-responsible party ("PRP") under CERCLA -- a bald assertion that Defendants Tyson and Cargill have utterly failed to substantiate -- this fact

would not abrogate its right to proceed under section 107(a) and to impose joint and several liability on the Poultry Integrator Defendants. This is because the State is a governmental entity, and under CERCLA a governmental entity may proceed under section 107(a) irrespective of whether it is or is not a PRP. *See United States v. Friedland*, 152 F.Supp.2d 1234, 1249 (D. Colo. 2001) ("I find that the government should be able to impose joint and several liability upon private PRPs even where the government agencies themselves are deemed PRPs"); *United States v. Hunter*, 70 F.Supp.2d 1100, 1108 (C.D. Cal. 1999) ("[T]he Court is persuaded that the government should be able to impose joint and several liability upon private PRPs, even when government agencies are themselves PRPs"). Should the State prevail on its CERCLA 107(a) claims, liability will thus be joint and several.

Additionally, Defendant Tyson in its response fails to adequately explain why the logic of *United States v. Ward*, 618 F.Supp. 884, 910-11 (E.D.N.C. 1985), which precludes contribution from third-party defendants where the defendant is an intentional tortfeasor, is not persuasive. *See State's Motion*, pp. 23-24 (noting that nothing in the language of 113(f) or its legislative history indicating that Congress intended to abrogate the long-standing rule that intentional tortfeasors are not entitled to contribution).

C. Alternatively, the third-party contribution claims of Defendants Tyson and Cargill should be severed and stayed

Even assuming arguendo that a right of contribution or indemnity were to exist in favor of a Poultry Integrator Defendant found liable under the State's claims, litigation of the contribution or indemnity claims of Defendants Tyson and Cargill in the State's case would cause complication of the proceedings and undue prejudice to the State. Accordingly, severing and staying the contribution or indemnity claims of Defendants Tyson and Cargill would be an appropriate remedy. Defendants Tyson's and Cargill's arguments to the contrary are thoroughly

unpersuasive.

For example, contrary to Defendant Tyson's contention, the third-party defendants' activities are not a necessary element of the State's claims. In support of its argument, Defendant Tyson relies heavily upon the C.F.R. provisions addressing Natural Resource Damage Assessments. Putting aside the question of whether it has correctly represented the content of the regulation, what Defendant Tyson neglects to inform the Court is that "the assessment procedures set forth in this part are not mandatory." 43 C.F.R. § 11.10 (emphasis added). There are numerous other procedures by which natural resource damages can be assessed. Suffice it to say, the State is well-aware of its evidentiary burdens in this case and fully intends to meet them. Further, the presence of the third-party defendants in the case is not necessary for the State to meet its evidentiary burdens.

Likewise, Defendant Tyson's contention that the presence of the third-party defendants in the case is necessary for it to establish its divisibility defense to the imposition of joint and several liability is logically flawed.¹¹ While playing lip-service to the fact that the divisibility doctrine is conceptually and legally distinct from contribution claims, Defendant Tyson then proceeds to muddle the issue. Under Defendant Tyson's logic, if Defendant Tyson is able to establish divisibility, joint and several liability does not attach. And if joint and several liability does not attach, then there would be no basis for a contribution claim -- and thus no basis for the presence of the third-party defendants in the case.

Finally, Defendant Tyson can offer only broad, unsupported and conclusory statements

¹¹ Defendant Cargill also asserts that discovery of the third-party defendants "bear[s] on issues of plaintiff's own contributory fault." Cargill Response, p. 14. Contributory fault, however, is not available as a defense where the harm is intentional. *See City of Tulsa v. Tyson Foods, Inc.*, 258 F.Supp.2d 1263, 1302 (N.D. 2003), *vacated pursuant to settlement*. Further, to the extent Defendant Cargill is suggesting (albeit, indirectly) that the State might somehow be liable for pollution allegedly caused by the third-party incorporated municipalities it has named, *see* Cargill Response, pp. 8-9, that suggestion is legally unsupportable and wrong.

that it will be prejudiced or that judicial economies and efficiencies will not be achieved if the third-party actions are severed and stayed. The facts are quite different, however. Defendants Tyson and Cargill have both denied any responsibility for the State's injury and, as such, their third-party contribution claims (to the extent they even exist) are contingent in nature.

Moreover, these third-party contribution claims are based upon facts independent of and unrelated to the State's case. As noted in its Motion, p. 10, for each of the 300+ third-party defendants, Defendants Tyson and Cargill would be required to prove, among other things, that the third-party defendant generated waste, that the waste constituents of the third-party defendant are the same as those of Defendants Tyson and Cargill, that the waste constituents of the third-party defendant were released into the IRW, and that the waste constituents of the third-party defendant contributed to the injury caused by Defendants Tyson and Cargill -- all at the same time Defendants Tyson and Cargill will be denying that the State has suffered any injury. The potential for confusion of the issues is obvious.

Simply put, litigating a contingent liability based upon different facts within the State's case would be disruptive, time-consuming, confusing, and inefficient. Thus, the real prejudice is that which would be suffered by the State if the third-party claims are not severed and stayed.

D. There is no basis to delay a ruling on the State's Motion to sever and stay and / or strike or dismiss

Even assuming arguendo that the CERCLA contribution claims were legally viable, no Poultry Integrator Defendant moved to dismiss either of the State's CERCLA claims. Thus, Defendant Tyson's contention that efficiencies will be achieved by delaying a ruling on the State's Motion until the Poultry Integrator Defendants' 12(b)(6) motions are determined is a red-herring.

III. CONCLUSION

WHEREFORE, premises considered, the State respectfully requests this Court to enter an Order severing and staying and / or striking or dismissing the claims asserted in Tyson's third-party complaint and Cargill's third-party complaint.

Respectfully submitted,

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May 12, 2006

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